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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 12  
EJS

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Victory Foodservice Distributors Corp.

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Serial No. 75/460,669

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LLP for Victory Foodservice Distributors Corp.

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Office 111 (Craig D. Taylor, Managing Attorney)

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Before Seeherman, Bucher and Holtzman, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Victory Foodservice Distributors Corp. has appealed  
from the final refusal of the Trademark Examining Attorney  
to register the mark shown below, hereafter referred to as  
VICTORY FOODSERVICE, for "wholesale food distributorship  
services" in Class 35.<sup>1</sup> The words FOODSERVICE and WHOLESAL  
FOOD DISTRIBUTORS have been disclaimed.

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<sup>1</sup> Application Serial No. 75/460,669, filed April 1, 1998, and  
asserting a bona fide intention to use the mark in commerce. It



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground of likelihood of confusion with three marks registered by Victory Markets, Inc. for "wholesale and retail supermarket services." One mark is VICTORY MARKETS per se<sup>2</sup> and two are VICTORY MARKETS and design marks, shown below. In each, the word MARKETS had been disclaimed.

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is noted that there was some confusion about the identification and classification of the services. Applicant had originally identified its services as "wholesale food distribution services" in Class 42. The Examining Attorney required that the word "distribution" be changed to "distributorship, and that the classification be changed to Class 35. In its response to the Office action, applicant amended the classification, and appeared to intend to comply with the Examining Attorney's requirement as to the amendment of the services, but in fact offered an amendment that was identical to the original identification. With its appeal brief applicant requested that the application be remanded to the Examining Attorney in order to comply with her requirement for an acceptable identification. The application was remanded, and the Examining Attorney entered the amendment, but noted that applicant had, again apparently inadvertently, identified its services as being in Class 42. Accordingly, and because classification decisions are an administrative matter, the Examining Attorney corrected the classification by Examiner's Amendment. Accordingly, the identification and classification now reads as shown above.

<sup>2</sup> Registration No. 1,413,793, issued February 26, 1986; Section 8 affidavit accepted; Section 15 affidavit received.

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Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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<sup>3</sup> Registration No. 1,413,800, issued October 14, 1986; Section 8 affidavit accepted; Section 15 affidavit received. In addition to the word MARKETS, INC. has also been disclaimed.

<sup>4</sup> Registration No. 1,419,547, issued December 2, 1986; Section 8 affidavit accepted; Section 15 affidavit received.

Turning first to the services, applicant's services are identified as "wholesale food distributorship services" while the registrant's are for "wholesale and retail supermarket services." Applicant has focused on the retail supermarket services of the cited registrations, and has from that viewpoint constructed a series of arguments that the services are offered through different channels of trade to different classes of consumers. However, applicant has essentially ignored the fact that the cited registration includes "wholesale supermarket services." These services are extremely similar to applicant's, both involving the sale of food products at wholesale prices. Moreover, these services, like applicant's, would be directed to commercial buyers in the food industry. Such consumers are likely to assume a connection between wholesale supermarket services and wholesale food distributorship services if they were sold under confusingly similar marks.<sup>5</sup>

As an aside, we note that applicant, during the prosecution of its application, asserted that the registrant's wholesale supermarket services referred to the

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<sup>5</sup> In view of our finding that applicant's services are related to the registrant's wholesale supermarket services, we need not reach the question of likelihood of confusion with respect to the registrant's identified retail supermarket services.

stocking of registrant's retail stores. Applicant did not make this argument in its brief, but we think it necessary to point out that it is without merit. The identification in the cited registrations does not limit the registrant's services to the stocking of its own stores; in fact, it is not clear that such an activity would constitute a service for which registration could be obtained, since a service must be an activity for others, not an activity a party performs only for its own benefit.

With respect to the marks, we concur with applicant and the Examining Attorney that marks must be compared in their entireties. However, as the Examining Attorney has pointed out, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Here, we find that the word VICTORY is the dominant element of applicant's mark and at least of the registrant's word mark. In applicant's mark, VICTORY is visually the largest part of the mark, and the portion with the strongest source-indicating value. The rest of the mark consists of the descriptive/generic words FOODSERVICE and WHOLESALE FOOD DISTRIBUTORS and, in much smaller letters, the laudatory slogan THE QUALITY YOU DESIRE, THE SERVICE YOU

REQUIRE, with the design of a cornucopia framing the "V" in VICTORY and emphasizing that word. Applicant has stated that the size limitations of the Office's drawing requirements resulted in the small size of the slogan but, as the Examining Attorney pointed out, however much the mark might be enlarged, the relative size of the word VICTORY would still be much larger, and would dominate the word visually. Moreover, it is this word, rather than the descriptive words or slogan by which consumers are likely to refer to applicant's services, and consequently it is this word which they will note and remember.

VICTORY is also the dominant element of the word mark VICTORY MARKETS, since the disclaimed word MARKETS is obviously a generic word for the services. Although the initials "V" and "VM" are visually strong in the other cited marks, it is still by the word VICTORY that consumers will refer to the source of the services. Further, the letter designs in the marks, because they are the initials of the words, reinforce the word portions.

As a result, the commercial impression of applicant's mark and the registered marks is the same.

Applicant asserts that a comparison of all of the marks yields more differences than similarities. However, it is the point of similarity, the arbitrary word VICTORY,

which has the strongest source-indicating value, and is the portion of the marks most likely to be noticed and remembered by purchasers. Under actual marketing conditions consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980). In this case, even if consumers were to recognize the differences in the marks, they are likely to believe that applicant's mark is merely a variation of the registrant's other design marks.

Although neither applicant nor the Examining Attorney has discussed the other duPont factors, we note that there is no evidence of any third-party registrations or use of VICTORY marks for related goods or services, thus supporting our view that the registrant's marks are strong marks which are entitled to a broad scope of protection. Further, in reaching our decision we have considered that applicant's and the registrant's wholesale food services will be offered to retail supermarkets and grocers, and that such purchasers are more sophisticated than the general public. However, given the strength of the registrant's marks, the similarities of the marks, and the

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relatedness of the services, even sophisticated purchasers are likely to be confused as to the source of the services.

Decision: The refusal of registration is affirmed.